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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

SUSAN GOMEZ, Plaintiff and Appellant, v. PADRE DAM MUNICIPAL WATER DISTRICT, Defendant and Respondent.	D059668 (Super. Ct. No. 37-2010-00059136-CU-PO-EC)

APPEAL from a judgment of the Superior Court of San Diego County, Eddie C. Sturgeon, Judge. Affirmed.

Plaintiff Susan Gomez appeals from a judgment in favor of defendant and respondent Padre Dam Municipal Water District (District), entered after the court sustained District's demurrer to Gomez's first amended complaint without leave to amend. The principal issue in this recreational use of property case is whether the trial court properly sustained the demurrer on the grounds that District was immune from

liability under Government Code[1] section 831.4, subdivision (b). We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On August 13, 2010, Gomez filed a government tort claim with District alleging she was injured on a "paved pathway" within Santee Lakes recreational park, a public property owned by District. Gomez was walking on the "paved pathway" when she stepped into a pothole and sustained significant injuries. District rejected her claim on August 16, 2010.

On September 7, 2010, Gomez filed a civil complaint against District, pleading a single cause of action for premises liability. She alleged she was walking on a "pathway adjacent to [c]ampground 115 and [c]ampground 117 in the City of Santee, California," when she tripped on a hazard in the road, causing her to fall and sustain significant injuries. She alleged that District was liable for her injuries because District failed to properly maintain its public property, and allowed the "paved pathway" to develop the dangerous condition that proximately caused her injuries. (See § 835.) District demurred to the complaint, arguing it was immune from liability because the "paved pathway" was a recreational "trail" covered by the terms of section 831.4, subdivision (b).[2]

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1 All statutory references are to the Government Code unless otherwise specified.

2 Subdivision (b) of section 831.4 provides a public entity immunity from liability regarding a dangerous condition of any trail that is used for, or provides "access to[,] fishing, hunting, camping, hiking, riding, . . . water sports, recreational or scenic areas" and which is not a city street or highway. (§ 831.4, subds. (a) & (b).) We will further outline the terms of this statute and discuss its application to this case in part II, *post*.

Rather than opposing District's demurrer, Gomez amended her complaint changing the allegations about where the incident occurred from a "paved pathway" to a "paved roadway." District again demurred, arguing that Gomez's first amended complaint (FAC) was a sham pleading because she changed the location of the incident from a "pathway" to a "roadway" in an apparent attempt to circumvent the governmental immunity provided in section 831.4, subdivision (b). District further argued that regardless of what Gomez chose to call the location of the incident, her claim was nonetheless barred under section 831.4, subdivision (b), because the complaint still alleged facts establishing that the "paved pathway" is a "trail" for purposes of section 831.4, subdivision (b).

Gomez opposed the demurrer, asserting her FAC was not a sham pleading because her further investigation of the property revealed that the location of the incident was a "paved roadway," and not a "paved pathway" as she had originally pleaded. Gomez further argued that a "paved roadway" is not a "trail" under section 831.4, subdivision (b), because a paved roadway is more akin to a city street, which is not protected under the statute. In the alternative, Gomez asked for leave to amend her complaint. However, Gomez did not state how she would amend her complaint if the court found her allegations insufficient to state a cause of action.

After oral argument, the court sustained District's demurrer without leave to amend, and dismissed the action after entering judgment in favor of District. This appeal followed.

DISCUSSION

I

APPLICABLE STANDARDS OF REVIEW

" 'In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. "We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed." [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states sufficient facts to state a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff.' [Citation.]" (*Blumhorst v. Jewish Family Services of Los Angeles* (2005) 126 Cal.App.4th 993, 999; see also *McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415 [noting the standard of review for a demurrer is de novo].)

"To meet [the] burden of showing abuse of discretion, the plaintiff must show how the complaint can be amended to state a cause of action. [Citation.] However, such a showing need not be made in the trial court so long as it is made to the reviewing court." (*William S. Hart Union High School Dist. v. Regional Planning Com.* (1991) 226 Cal.App.3d 1612, 1621.) "[W]e may affirm a trial court judgment on any basis presented

by the record whether or not relied upon by the trial court." (*Day v. Alta Bates Medical Center* (2002) 98 Cal.App.4th 243, 252, fn. 1 (*Day*).)

II

SCOPE OF PERMISSIBLE AMENDMENTS: SHAM PLEADING DOCTRINE

District asserts that Gomez's FAC is a sham pleading because it contradicts the language of her original complaint and government tort claim. District contends Gomez changed the location of the incident from a "paved pathway" to a "paved roadway" to circumvent the immunity provided in section 831.4, subdivision (b).

It is well established that "when reviewing a judgment entered following the sustaining of a demurrer without leave to amend, the appellate court must assume the truth of the factual allegations of the complaint. [Citation.] However, an exception exists where a party files an amended complaint and seeks to avoid the defects of the prior complaint either by omitting the facts that rendered the complaint defective or by pleading facts inconsistent with the allegations of prior pleadings. [Citations.] In these circumstances, the policy against sham pleading permits the court to take judicial notice of the prior pleadings and requires that the pleader explain the inconsistency. If he fails to do so the court may disregard the inconsistent allegations and read into the amended complaint the allegations of the superseded complaint. [Citations.]" (*Owens v. Kings Supermarket* (1988) 198 Cal.App.3d 379, 383-384.)

Gomez's initial complaint and government tort claim alleged the incident occurred on a "paved pathway." It was only after Gomez received District's demurrer that she chose to amend her complaint to change the location of the incident from a "paved

pathway" to a "paved roadway," without providing any plausible explanation for the change. Gomez's amendment carries with it an "onus of untruthfulness" as it can reasonably be implied that she changed the facts of the complaint to avoid the effect of governmental immunity. (*Avalon Painting Co. v. Alert Lumber Co.* (1965) 234 Cal.App.2d 178, 184.) Therefore, in evaluating the record, we will disregard the conflicting allegations in Gomez's FAC. For purposes of this appeal, the appropriate approach is to assume, as alleged by Gomez's original complaint and government tort claim, that she was injured while walking on a "[paved] pathway adjacent to [c]ampground 115 and [c]ampground 117 in the City of Santee, California."

III

ANALYSIS: RECREATIONAL TRAIL IMMUNITY

We next decide the legal issue of whether the trial court erred in concluding District was immune from liability under section 831.4, subdivision (b). At the outset, we note that "the purpose for which a road or trail [is] being used is ordinarily viewed as an issue of fact." (*Giannuzzi v. State of California* (1993) 17 Cal.App.4th 462, 467.) However, "it becomes one of law if only one conclusion is possible." (*Ibid*.) Here, the parties do not dispute the purpose for which the "paved pathway" was being used, and we may resolve the issue of whether section 831.4 applies to this case as a matter of law. In our analysis, we will evaluate the pleadings to decide if all the allegations disclose that the "paved pathway" on which Gomez was injured amounts to a "trail" for purposes of applying section 831.4, subdivision (b).

A. Section 831.4

Under section 831.4, subdivision (a), a public entity is not liable for any injuries caused by a condition of: "(a) Any unpaved road which provides access to fishing, hunting, camping, hiking, riding, including animal and all types of vehicular riding, water sports, recreational or scenic areas and which is not a (1) city street or highway or (2) county, state or federal highway or (3) public street or highway of a joint highway district, boulevard district, bridge and highway district or similar district formed for the improvement or building of public streets or highways." Subdivision (b) of the statute expands subdivision (a)'s immunity to "[a]ny trail used for the above purposes."

This immunity is intended to " 'encourage public entities to open their property for the public recreational use, because "the burden and expense of . . . defending claims for injuries would probably cause many public entities to close such areas to public use." ' [Citation]." (*Amberger-Warren v. City of Piedmont* (2006) 143 Cal.App.4th 1074, 1078 (*Amberger*).) "The trail immunity provided in subdivision (b) of the statute extends to trails that are used for the activities listed in subdivision (a) and to trails that are used solely for access to such activities." (*Ibid*.) Subdivision (b) applies to both paved and nonpaved trails. (*Armenio v. County of San Mateo* (1994) 28 Cal.App.4th 413, 418.)

"Whether the property is a trail [under § 831.4, subd. (b),] depends on a number of considerations, including accepted definitions of the property [citations], the purpose for which the property is designed and used, and the purpose of the immunity statute [citation]." (*Amberger, supra,* 143 Cal.App.4th 1074, 1078-1079.) We examine these factors to decide if immunity bars Gomez's complaint as a matter of law.

1. Accepted Definitions and Purpose

First, the "paved pathway" described by Gomez constitutes a trail under accepted definitions because it is a "path," and as *Carroll v. County of Los Angeles* (1997) 60 Cal.App.4th 606, 609 (*Carroll*), observed, a path is synonymous with a "trail." (*Ibid.* [dictionary definition of a trail is a " 'marked or established *path* or route . . .' " (Webster's Collegiate Dict. (10th ed. 1995), p. 1251]; see also *Treweek v. City of Napa* (2000) 85 Cal.App.4th 221, 230 [a trail "consist[s] primarily of a path or track"].)

Second, the "paved pathway" qualifies under the section as a trail because the pleadings demonstrate it was designed and used to provide access to recreational and camping areas, i.e., the pathway was used to access campground 115 and campground 117 in Santee Lakes. The immunity of section 831.4, subdivisions (a) and (b), extends to any trail that provides access to camping and recreational areas, and the "paved pathway" in this case is alleged to be used for this very purpose.

Nothing in the pleadings provides a basis to distinguish this trail from the paved pathways found to be trails in other cases. (See *Amberger, supra*, 143 Cal.App.4th at p. 1079 [a paved pathway providing access to a dog park is a trail under § 831.4, subd. (b)]; see also *Carroll, supra*, 60 Cal.App.4th at pp. 609-610 [a paved pathway providing connecting two beaches is a trail under § 831.4, subd. (b)].)

Gomez nevertheless asserts the "paved pathway" in this case amounts to a "roadway/street," and argues that such roadways and streets are not covered by immunity under section 831.4, subdivisions (a) and (b). Gomez believes that the "paved pathway" can be shown to be a "roadway/street" by simply pronouncing that it is a

"roadway/street." She notes multiple times in her opening and reply briefs that she considers the paved pathway to be a "roadway/street" and, therefore, it should not be protected by governmental immunity. But as the court in *Farnham v. City of Los Angeles* (1998) 68 Cal.App.4th 1097, 1103, explained: "An object is what it is. For example, an adjacent parking lot does not become a trail by the simple expedient of calling it a trail. The design and use will control what an object is, not the name." Gomez cannot defend her pleadings by simply calling the "paved pathway" a "roadway/street." Our analysis must focus on the operative pleading and not upon the language Gomez now chooses to describe the "paved pathway" in her opening and reply briefs. The design and purpose will control what an object is. (*Amberger, supra*, 143 Cal.App.4th at p. 1080.) On the face of the pleadings, the design and purpose of the "paved pathway" in this case fit squarely within the protections of section 831.4, subdivision (b).

2. Purpose of the Immunity Statute

" 'The whole point of Government Code section 831.4 is to encourage public entities to keep recreational areas open, sparing the expense of putting undeveloped areas in a safe condition, and preventing the specter of endless litigation over claimed injuries.' " (*Hartt v. County of Los Angeles* (2011) 197 Cal.App.4th 1391, 1399 (*Hartt*).)

The "paved pathway" in this case should be treated as a "trail" to fulfill the legislative purpose of the statute, "because public entities could well be inclined to close [public campgrounds] if they were exposed to liability for accidents like the one here." (*Amberger, supra,* 143 Cal.App.4th at p. 1079.)

As the court in *Hartt* observed, "it is cheaper to build fences and keep the public out than to litigate and pay three, four, five or more judgments each year in perpetuity. But, that would deprive the public of access to recreational opportunities. If public entities cannot rely on the immunity for recreational trails, they will close down existing trails and perhaps entire parks where those trails can be found. [Citation.]" (*Hartt, supra*, 197 Cal.App.4th at p. 1400.) For these same reasons, the legislative purpose of section 831.4 would be well served by recognizing immunity applies to the circumstances of this case.

Thus, we conclude the trial court correctly sustained District's demurrer on the grounds that Gomez's complaint was barred by the recreational trail immunity provided in section 831.4, subdivision (b).[3]

B. Any Reasonable Possibility of Further Amendment?

Ordinarily, " 'it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment.' " (*Bragg v. Valdez* (2003) 111 Cal.App.4th 421, 428.) Gomez bears the burden of demonstrating a reasonable possibility that she may cure defects by amendment, by showing in what manner the complaint can be amended

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[3] We are aware the trial judge gave alternate reasons for sustaining the demurrer, such as when he explained at the hearing that he believed the "paved roadway" fit squarely within the recreational trail immunity in section 831.4, subdivision (b). However, on appeal from a demurrer dismissal, it is the trial court's ruling, not its reasoning that is reviewed. (*D'Amico v. State Board of Medical Examiners* (1974) 11 Cal.3d 1, 19; see also *Day*, *supra*, 98 Cal.App.4th at p. 252, fn. 1.) Thus, "we may affirm a trial court judgment on any basis presented by the record whether or not relied upon by the trial court." (*Ibid.*)

and how it will change the legal effect of the pleadings. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.)

Gomez has not met this burden. She already amended her complaint by changing the "paved pathway" description to a "paved roadway," and that amendment did not cure the defects in the complaint. The only suggestion by Gomez of a possible amendment to her complaint appears in her opening brief where she states: "Had the court given [her] leave to amend, she would label the 'paved roadway' as a street." This new suggestion is no better. Changing the name of the location of where the incident occurred will not overcome the immunity against such liability, as provided by section 831.4, subdivision (b). Therefore, Gomez has failed to sustain her burden of showing there was an abuse of discretion in the trial court's denial of leave to amend the FAC. We conclude the trial court's ruling was proper.

DISPOSITION

The judgment is affirmed. Costs are awarded to Respondent.

HUFFMAN, Acting P. J.

WE CONCUR:

NARES, J.

McINTYRE, J.